* **HIGH COURT OF DELHI : NEW DELHI**

\+ **RFA No. 299 of 2004**

Judgment reserved on: August 29, 2007

% Judgment delivered on: September 21, 2007

1. Shri Arun Kumar Jain

2. Shri Tarun Kumar Jain

Both sons of Shri Bimal Prasad Jain
E-9, Connaught Place
New Delhi ...Appellants

Through Mr. V.P. Singh, Senior Advocate with
Mrs. Anju Bhattacharya, Advocate

Versus

1. Raghubir Saran Charitable Trust
through Shri Harsh Kumar Agarwal
42, Janpath, New Delhi

2. Mrs. Kiran Agarwal
Trustee,
42, Janpath, New Delhi

3. Shri Surender Nath Behl,
Trustee
42, Janpath, New Delhi ...Respondents

Through Dr. A.M. Singhvi and Mr. Ravinder
Sethi, Senior Advocates with
Mr. Naresh Thanai, Mr. Simran Mehta
and Mr. Puneet Sharma, Advocates

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

This first appeal arises out of a judgment and decree dated 11th May, 2004 passed by the learned Additional District Judge, Delhi purportedly on an application under Order VIII Rule 10 read with Order XII Rule 6 of the Code of Civil Procedure (CPC) filed by the Plaintiffs/Respondents in Suit No.356 of 2003.

2. The primary facts of the case are not in dispute but what is important is the contention of learned counsel for the Appellants that the learned Additional District Judge passed the judgment and decree without any application of mind. Unfortunately, we are of the opinion that learned counsel for the Appellants is right in his submission and so the judgment and decree deserve to be set aside. A reading of the

judgment is a reminder of what the French jurist Saleilles said in his treatise “De la Personnalite Juridique”:

> “One wills at the beginning the result; one finds the principle afterwards; ... ...”

3. It is necessary to state some background facts. The Appellants are tenants in property bearing No.E-9, Connaught Place, New Delhi (the suit property). The Respondents are the landlords. When the tenancy commenced some time in 1954, the monthly rent was Rs.585.50. This was increased from time to time and when the suit was filed by the Respondents, the monthly rent had gone up to Rs.3,660.50.

4. By virtue of the provisions of the Delhi Rent Control Act, 1958, a tenant who pays more than Rs.3,500/- per month as rent does not have the protection of the rent control legislation. Consequently, for recovering possession of the suit property from the Appellants, the Respondents could file a simple suit for recovery of possession, if the need arose, under the provisions of the Transfer of Property Act, 1882.

5. It appears that need did arise and so the Respondents sent a notice to the Appellants on 7th June, 2000 terminating the tenancy and seeking recovery of possession of the suit property. However, according to the Appellants, the parties had earlier entered into negotiations and it was agreed between them that the suit property would be sold to the Appellants for a sum of Rs.45 lakhs. Out of this amount, the Appellants allegedly paid to the Respondents a sum of Rs.5 lakhs by cheque which was encashed by the Respondents on 8th May, 2000. A further amount of Rs.10 lakhs was allegedly paid by the Appellants to the Respondents much later in cash. Therefore, according to the Appellants, the question of handing over vacant possession of the suit property did not arise.

6. Be that as it may, on 2nd August, 2000, the Respondents filed a suit against the Appellants for recovery of possession of the suit property as well as for mesne profits. The suit was filed in this Court but was transferred to the District Court, Delhi in late 2003 for want of pecuniary jurisdiction.

7. It appears that even during the pendency of the suit, the parties held negotiations regarding the sale of the suit property. However, we need not go into the details in this regard except to mention that on 16th October, 2001, learned counsel appearing for the Appellants informed the Joint Registrar before whom the matter was listed that the disputes between the parties have almost been compromised and that a compromise application would soon be moved. The possibility of a compromise was denied by learned counsel appearing for the Respondents. The Joint Registrar then gave time to the Appellants to file their written statement but the record shows that they did not do so till 1st August, 2002 in spite of an application having been filed by the Respondents for a direction to the Appellants to file their written statement.

8. As mentioned above, on or about 22nd July, 2002, the Respondents filed an application bearing IA No.6375/2002, being an application under Order VIII Rule 10 read with Order XII Rule 6 of the CPC with a prayer that the Hon'ble Court may be pleased to pronounce judgment/decree against the Appellants in respect of the suit property

and to pass any other and further orders which may be deemed appropriate. This application was based on the fact that till then the Appellants had not filed their written statement.

9. When the application was taken up on 5th August, 2002, it was noted that the written statement had been filed (on 2nd August, 2002) and, therefore, no orders were necessary on the application. Accordingly, the application was disposed of with liberty to the Respondents to file an application under Order XII Rule 6 of the CPC.

10. On 21st April, 2003 when the case was taken up in Court, learned counsel for the Respondents stated that even though his clients had been permitted to file an application under Order XII Rule 6 of the CPC, yet they did not wish to do so. Learned counsel further stated that the Respondents request the Court to exercise its powers suo motu and pass a decree in terms of Order XII Rule 6 of the CPC and submitted that some arguments were advanced in this regard on an earlier occasion also.

11. Thereafter, the pecuniary jurisdiction of this Court was increased to Rs.20 lakhs and so the suit was transferred to the learned District Judge, Delhi and an appropriate order in this regard was passed on 4th November, 2003. Both parties were directed to appear before the learned District Judge on 19th December, 2003. It is under these circumstances that even though the suit was initiated in this Court, it came to be taken up by the learned Additional District Judge, Delhi.

12. The record of the case shows that IA No.6375/2002 filed by the Respondents in this Court was disposed of on 5th August, 2002 with liberty to them to file an application under Order XII Rule 6 of the CPC but they chose not to file any such application. On the contrary, it was stated on their behalf by their learned counsel on 21st April, 2003 that the Respondents do not wish to file an application and that the Court may exercise its powers suo motu and pass a decree in terms of Order XII Rule 6 of the CPC.

13. Notwithstanding this, when the matter was taken up by the learned Additional District Judge on 25th February, 2004, she recorded

in the order sheet that the matter would stand adjourned to 22nd March, 2004 for arguments on the application under Order XII Rule 6 of the CPC. Strangely, none of the parties informed the learned Additional District Judge that no such application was pending. On her part, the learned Additional District Judge did not check the record of the case to ascertain whether any such application was pending or not.

14. Order XII Rule 6 of the CPC reads as follows:

> "**Order XII – Admissions**
>
> 1 to 5 xxx xxx xxx
>
> 6. **Judgment on admissions.** – (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
>
> (2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

15. It is important to note that the learned Additional District

Judge could have "of its own motion" made an order or passed judgment, as she thought fit, having regard to the alleged admissions of fact made in the pleadings. But, as the impugned judgment and decree suggest, she did not exercise any suo motu power but purported to decide a non-existent application filed under Order XII Rule 6 of the CPC. This is one of the aspects (there are three more) highlighted by learned counsel for the Appellants in support of his contention that the judgment and decree suffer from a non-application of mind.

16. In this context, we may note some of the statements made in the judgment under appeal.

In paragraph 1, it is stated that "By the present order I shall dispose of an application under order 8 r 10 read with order 12 rule 6 CPC moved by the plaintiff."

In paragraph 2, it is stated that "In the present application the plaintiff has stated ... ..."

In paragraph 4, it is stated that "Facts leading to the present application are that ... ..."

There is no manner of doubt, from the above, that the learned

Additional District Judge thought that she was dealing with a pending application and was not exercising any suo motu power.

17. As mentioned above, on 25th February, 2004 the suit was adjourned to 22nd March, 2004 for arguments on the "application" under Order XII Rule 6 of the CPC.

On 22nd March, 2004, the case was adjourned to 15th April, 2004 for arguments on the "application" under Order XII Rule 6 of the CPC.

On 15th April, 2004 the case was adjourned to 19th April, 2004 for orders on the "application" under Order XII Rule 6 of the CPC.

On 19th April, 2004 learned counsel for the Appellants filed some documents and so the case was adjourned to 30th April, 2004 for re-arguments on the "application" filed under Order XII Rule 6 of the CPC.

On 30th April, 2004 the case was adjourned to 11th May, 2004 for orders on the "application" under Order XII Rule 6 of the CPC.

On 11th May, 2004 the "application" under Order XII Rule 6 of the CPC was allowed and only a decree of possession was passed –

there were no orders passed by the learned Additional District Judge on the prayer of the Respondents for mesne profits. This is the second aspect highlighted by learned counsel for the Appellants in support of his contention that the judgment and decree suffered from non-application of mind. Learned counsel for the Respondents contended that they are not aggrieved by the failure of the learned Additional District Judge to award mesne profits. While this may be so, what is of relevance is the question whether the learned Additional District Judge applied her mind to the case at hand. The award of mesne profits was one of the prayers made by the Respondents and since it was not specifically given up, it should have at least been adverted to. Whether the Respondents have decided to give up that prayer after the judgment and decree is of no consequence.

18. At this stage, it may be worthwhile to mention the third and fourth aspects of the case which, according to learned counsel for the Appellants, also show non-application of mind by the learned Additional District Judge. The third aspect concerns the defence of the Appellants that they had entered into an agreement with the

Respondents to purchase the suit property. According to the Appellants, the parties had entered into an agreement to sell on 11th May, 2000. This is how the learned Additional District Judge deals with this issue:

> "As per the list of documents filed on record which is a copy of agreement to sell dated 11.5.00 whereas the document prima facie appears to be the original document and stamp paper of Rs.2/- on which the agreement has been written has been issued on 10.5.01 whereas the agreement is alleged to have been executed on 11.5.00. That means this agreement has been executed on a stamp paper which was issued after one year of the execution of the document."

Quite naturally, we were a little taken aback on reading this and therefore referred to the documents on record. The original agreement is on the file of the case and on a perusal of the document, we find that it is dated 11th May, 2001 and the stamp paper was purchased on 10th May, 2001. It is not clear how the learned judge got the dates mixed up – it may be a typographical error – but in the overall context of the facts of the case, we have our reservations whether it was a simple case of a typographical error.

19. The fourth aspect of the case is also worth noticing. In paragraph 11 of the judgment and decree, the learned judge observes

that even if the Respondents had agreed to sell the suit property to the Appellants, the agreement did not confer any right on the Appellants to the suit property since "admittedly till 2003 the defendants have not filed a suit for specific performance against the alleged agreement for sale." This observation hides the complete truth because it is only partially correct, although in the context in which it is made, it is completely incorrect. The Appellants had not filed a suit against the Respondents for specific performance of the agreement "till 2003" but on or about 17th March, 2003 they had filed a suit for specific performance in this Court and a copy of the plaint was filed before the learned Additional District Judge on 19th April, 2004 as per the record of the case and as per the order sheet of 19th April, 2004. The learned Additional District Judge appears to have been blissfully unaware of the filing of a suit by the Appellants for specific performance of the agreement to sell dated 11th May, 2001. The effect of this, for whatever it is worth, ought to have been considered by the learned Additional District Judge, but it seems that she was ignorant of this fact.

20. On all the facts that have been mentioned above, there is no disagreement between learned counsel for the parties. The difference of

opinion between them is in respect of the law that has to be applied. According to learned counsel for the Appellants, since there was no application of mind by the learned Additional District Judge, the order under appeal ought to be set aside. On the other hand, according to learned counsel for the Respondents, even though the learned Additional District Judge may have made some errors, the legal position was correctly understood by her and was correctly applied. Both learned counsel for the parties addressed us on the scope of Order XII Rule 6 of the CPC in the context of a case such as the present which essentially deals with recovery of possession of the suit property pursuant to termination of the lease under the provisions of the Transfer of Property Act, 1882.

21. There is no doubt that admissions for the purposes of Order XII Rule 6 of the CPC must be clear, unequivocal and unambiguous. This is settled by two decisions of this Court, namely, ***Baljit Kaur v. United Insurance Co. Ltd., 1997 VI AD (DELHI) 937*** and ***Jagannath Chauhan v. S.C. Nanda, 2000 VII AD (DELHI) 961***. Similar view was earlier taken in ***Union of India v. M/s Feroze & Co., AIR 1962 J&K 66***.

What is equally important is that a judgment on admissions is a matter of discretion and not a matter of right (***Baljit Kaur***) and that the admissions should be taken as a whole and not in part (***Jagannath Chauhan***).

22. While we are in general agreement with the principles of law mentioned above, what is of prime concern to us is this: Did the learned Additional District Judge apply her mind to the facts of the case, as they appear on the record? If the answer to this is in the affirmative, then the next question would be whether the learned Additional District Judge has correctly applied the legal principles?

23. Proceeding on this basis, it seems to us that the four circumstances presented by learned counsel for the Appellants, as they appear from the judgment and decree and the case records, may not mean very much if they are considered individually; but if they are appreciated collectively or cumulatively, as they should be, then it is quite apparent that the learned Additional District Judge did not apply her mind to the facts and documents on record and proceeded to dispose

of the "application" in a pre-determined manner. In view of this, the impugned judgment and decree deserves to be set aside.

24. Learned counsel for the Respondents contended that in a case such as the present, the three elements that are required to be shown by the plaintiff for recovery of possession are as follows:

(a) There is no dispute about the existence of a month to month tenancy between the parties.

(b) There is no dispute that the provisions of the Delhi Rent Control Act, 1958 are not applicable.

(c) There is no dispute that a valid notice of termination of the tenancy has been served by the landlord upon the tenant.

25. According to learned counsel for the Respondents, once these three elements are shown, a decree for possession must inevitably follow. Reliance in this regard was placed on ***Ved Prakash v. Marudhar Services Ltd., 2000 (54) DRJ 654***, ***Rajiv Sharma v. Rajiv Gupta, AIR 2004 Del 248***, ***Ms. Mani Mann v. Smt. Ram Dulari, 90 (2001) DLT 305***, ***Surjit Sachdev v. Kazakhstan Investment Services***

Pvt. Ltd., 66 (1997) DLT 54 and ***Zulfiquar Ali Khan v. J.K. Helene Curtis Ltd., AIR 2002 Del 425***.

26. Learned counsel for the Respondents also emphasized, relying upon ***Rajiv Sharma***, that the entire purpose of Order XII Rule 6 of the CPC is to enable a party to obtain speedy justice to the extent of the relevant admissions that are made. It was submitted that it is for this reason that the scope of enquiry under Order XII Rule 6 of the CPC is rather limited and by limiting that scope of enquiry, the learned Additional District Judge did not commit any error in law.

27. It was also contended by learned counsel for the Respondents that the mere fact that the parties had entered into an agreement to sell (although this was denied by learned counsel for the Respondents) and a suit for specific performance was filed by the Appellants against the Respondents, the character of the relationship between the parties did not change. The Appellants continued to remain tenants of the Respondents who were entitled to evict them in accordance with law and if the Appellants did succeed in getting a decree in their favour in

the suit for specific performance, they would be entitled to re-enter the premises as owners thereof but until the ownership rights of the Appellants are determined, the status of the Appellants as tenants does not change nor does it give them any right to continue to remain in the suit property until their status as owners is determined one way or the other. In this context, reliance was placed upon ***D.S. Parvathamma v. A. Srinivasan, (2003) 4 SCC 705*** wherein the Supreme Court observed as follows:

> "…till a final decision has been reached the contract creates a right in the person in possession i.e. the tenant, to refuse to surrender possession of the premises even if such possession was obtained by him not in part-performance of the contract but in his capacity as a tenant. Having entered into possession as a tenant and having continued to remain in possession in that capacity he cannot be heard to say that by reason of the agreement to sell his possession was no longer that of a tenant."

28. Reliance was also placed by learned counsel for the Respondents on ***Bhagwandas Parsadilal v. Surajmal, AIR 1961 MP 237*** wherein it has been held as follows:

> "But that does not mean that till a final decision has been reached the contract creates a right in the present appellant to refuse to surrender possession of the premises, even if such possession was obtained by him not in part performance of the contract but in his capacity as a tenant.

> … … … Having entered into possession as a tenant and continued to remain in possession in that capacity the defendant cannot, in my opinion, be heard to say that by reason of the agreement to sell his possession is no longer that of a tenant."

29. We really do not think it necessary to go into the various contentions urged by learned counsel for the Respondents on the interpretation of Order XII Rule 6 of the CPC or on the validity of the defences urged by learned counsel for the Appellants. The reason for this is that these issues have not been objectively examined by the learned Additional District Judge. These issues have been examined on the basis of incorrect facts. Had the issues been considered in the context of the correct factual position, we would have certainly been obliged to go into the correctness or otherwise of the conclusions arrived by the learned Additional District Judge; but what has happened in the present case is that the learned Additional District Judge has taken a decision which, in our opinion suffers from a total non-application of mind inasmuch as important facts have been completely overlooked or distorted. The learned Additional District Judge proceeded on the basis that she was deciding an application Order XII Rule 6 of the CPC when

in fact there was no such application on record. We could have understood, and indeed it was permissible, if the learned Additional District Judge had taken suo motu notice of the admissions said to have been made by the Appellants and reached a conclusion on the basis of those admissions. But even that has not happened and we are, therefore, left wondering about the occasion which prompted the learned Additional District Judge to pass a decree on alleged admissions, the occasion being neither an application under Order XII Rule 6 of the CPC nor the exercise of suo motu jurisdiction. The learned Additional District Judge, in a sense, completely debunks the agreement to sell dated 11th May, 2001; she also overlooks the filing of a suit for specific performance of this agreement by the Appellants. Finally, the issue of mesne profits is not at all adverted to.

30. If we were to decide on the contentions urged by learned counsel for the Respondents, we would really be depriving the Appellants of a chance to put forward their case in the Court of first instance on all the above aspects. This would needlessly prejudice the Appellants who have really not had a fair chance to put forward their

point of view before the learned Additional District Judge. For this reason, we do not think it appropriate to express our opinion on the contentions urged by learned counsel for the Respondents. It is primarily for the Trial Court to take a view, if an appropriate application is made before it, or if it feels so inclined then in exercise of suo motu jurisdiction, and it is only thereafter that the first appellate Court can test the correctness or otherwise of the views expressed by the Trial Court.

31. For these reasons, we think that the appropriate order that should be passed is only to set aside the impugned judgment and decree and remit the matter back to the Trial Court for proceeding further in the matter in accordance with law. Of course, the learned Trial Judge will proceed from where the matter got diverted into unchartered territory. We also make it clear that our decision will not preclude the Respondents from moving an application Order XII Rule 6 of the CPC or any other application that they may choose to nor will it preclude the learned Additional District Judge from taking up the matter for passing a judgment on admissions should it feel inclined to do so and should the parameters of law permit such a course of action to be taken.

32. The appeal is allowed. The parties are directed to appear before the learned District Judge on 8th October, 2007. The Registry should send back the Trial Court record immediately.

Madan B. Lokur, J

September 21, 2007 **S. Muralidhar, J**
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Certified that the corrected copy of the judgment has been transmitted in the main Server.